

Message Text

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TAGS: EINV, DR

SUBJECT: CALVO CLAUSE AND RELATED PROVISIONS

REF : STATE 24007

1. THE FOLLOWING ARE ANSWERS TO QUESTIONS ASKED IN REFTEL.

A. THERE ARE NO PROVISIONS IN THE DOMINICAN CONSTITUTION OR STATUTES GENERALLY APPLICABLE TO FOREIGN INVESTMENT WHICH WOULD BE CLASSIFIED AS "CALVO CLAUSES" EXCEPT ART. 8 OF THE MINING LAW (NO. 146/1971), WHICH READS AS FOLLOWS: QUOTE ALL MINING CONCESSIONNAIRES ARE SUBJECT TO THE JURISDICTION OF THE LAWS AND COURTS OF THE REPUBLIC, AND WHEN A CASE INVOLVES FOREIGNERS, IT SHALL BE HELD THAT THEY HAVE WAIVED ALL DIPLOMATIC CLAIM ON ANY MATTER RELATIVE TO THE CONCESSION. END QUOTE SIMILAR LANGUAGE IS INCORPORATED IN ART. 4 OF THE PETROLEUM LAW (NO. 4532/1956), AMENDED BY LAW NO. 4833/1958 AS FAR AS ACCEPTANCE OF EXCLUSIVE JURISDICTION OF DOMINICAN COURTS (BUT THERE IS NO REFERENCE TO DIPLOMATIC REPRESENTATION) THE APPLICATION OF CALVO CLAUSE CONCEPT SEEMS TO HAVE BEEN APPLIED TO EXTRACTIVE ENTERPRISES ONLY.

B. PORTIONS OF THE DOMINICAN CIVIL CODE, AS AMENDED (ARTS. 11 AND 13), PROVIDE THAT RESIDENT FOREIGNERS ENJOY THE SAME RIGHTS AND UNCLASSIFIED

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PRIVILEGES BEFORE THE COURTS AS DO DOMINICAN NATIONALS.

C. OTHER PORTIONS OF THE CODE DEFINE JURISDICTION OF DOMINICAN COURTS INVOLVING CIVIL DISPUTES IN THE DOMINICAN REPUBLIC. THESE PROVISIONS MAY, IN EFFECT, PRECLUDE THIRD-PARTY ARBITRATION CLAUSES UNLESS THE DR ADHERES TO AN INTERNATIONAL AGREEMENT PROVIDING FOR ARBITRATION OUTSIDE THE DR. INTERNATIONAL CONVENTIONS WOULD SUPERSEDE CONTRARY PROVISIONS IN THE CODE. THE ARTICLES OF THE CODE, HOWEVER, ARE NOT DIRECTED SPECIFICALLY AT FOREIGN INVESTMENT.

D. PORTIONS OF THE CODE WHICH DIRECTLY AFFECT FOREIGN INVESTORS REQUIRE THAT NON-DOMINICAN NATIONALS MUST SECURE PRESIDENTIAL APPROVAL FOR OWNERSHIP OF ANY REAL PROPERTY IN THE DR.

E. FOREIGN INVESTMENT IS REGULATED IN THE DR PRINCIPALLY BY MONETARY BOARD RESOLUTION NO. 1 OF APRIL 1972 WHICH ESTABLISHES DESIRED AREAS FOR FOREIGN INVESTMENT AND LIMITS PROFIT REMITTANCES.

2. COMMENT:

A. IN SOME SITUATIONS DOMINICAN LAWS EMBODY THE CONCEPT THAT ONE CANNOT SIGN AWAY HIS RIGHTS, BUT DOMINICAN LAWYERS SAY THAT EFFORTS TO PLEAD SUCH A DEFENSE WOULD DEPEND UPON THE LAW UNDER WHICH SUCH AN ARGUMENT WAS BEING MADE, NOT THE ABSTRACT CONCEPT ITSELF.

B. THE DR IS A PARTY TO THE CODIGO BUSTAMONTE (HAVANA 1928), AN INTERNATIONAL ARBITRATION CONVENTION, BUT (WE UNDERSTAND) THE US IS NOT.

C. THE DR IS NOT A PARTY TO THE WORLD BANK'S INTERNATIONAL CENTER FOR THE SETTLEMENT OF INVESTMENT DISPUTES.

D. REGARDING ARBITRATION, SOME LOCAL LEGAL EXPERTS ARE OF THE OPINION THAT WHERE PERMITTED, ARBITRATION WOULD HAVE TO TAKE PLACE IN THE DR UNDER DOMINICAN LAW. THERE ALSO IS SOME DOUBT THAT ENFORCEMENT OF A FOREIGN ARBITRATION OR COURT JUDGMENT (EVEN IF PERMITTED) COULD BE ACCOMPLISHED IN THE DR. IF THE DOMINICAN PARTY TO THE DISPUTE REFUSED TO ABIDE BY SUCH A JUDGMENT, HE COULD RAISE UNCLASSIFIED

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THE ISSUE IN LOCAL COURTS WHICH MAY BE OBLIGED TO ACCEPT THE CASE DE NOVO. THE ISSUE HAS NOT YET BEEN TESTED IN LOCAL COURTS.

E. THE INTER-AMERICAN DEVELOPMENT BANK (IDB) HAS A CLAUSE IN ALL ITS LOANS WHICH PROVIDES FOR A THREE-MAN ARBITRATION BOARD.

F. EXPERIENCE OF FOREIGNERS INVOLVED IN CIVIL DISPUTES IN THE DR INDICATES THAT THEY HAVE RECEIVED REASONABLY FAIR AND IMPARTIAL

TREATMENT, PARTICULARLY AT THE SUPREME COURT LEVEL.

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